

1 THE HONORABLE BENJAMIN H. SETTLE  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 MADELEINE GARZA, an individual, ) Case No. 3:18-CV-05106-BHS  
11 v. )  
12 NATIONAL RAILROAD PASSENGER ) DEFENDANT NATIONAL  
13 CORPORATION d/b/a AMTRAK, ) RAILROAD PASSENGER  
14 ) CORPORATION'S MEMORANDUM  
15 ) IN SUPPORT OF PROPOSED  
16 ) STIPULATION RE: ACCIDENT  
17 ) FACTS  
18 )  
19 ) Defendant. ) NOTE ON MOTION CALENDAR:  
20 ) ) NOVEMBER 5, 2019  
21 ) ) TRIAL DATE:  
22 ) ) NOVEMBER 6, 2019

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23 Defendant National Railroad Passenger Corporation (“Amtrak”) respectfully submits the  
24 following memorandum in support of its Proposed Stipulation Re: Accident Facts.

25 As discussed in today’s telephonic hearing on Amtrak’s Supplemental Motion in Limine  
26 (Dkt. 62), Amtrak has been attempting to reach a stipulation with Plaintiff’s counsel that is  
27 consistent with the Court’s guidance provided at the Pretrial Conference. Amtrak is submitting  
herewith a proposed stipulation that it believes is consistent with the Court’s guidance and  
requests that it be entered and read to the jury in lieu of allowing Plaintiff to call Train 501’s  
conductor and engineer at trial.

Rule 16 gives this Court the power to “consider and take appropriate action on...obtaining  
admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in  
advance on the admissibility of evidence.” Fed. R. Civ. P. 16(c)(2)(C). Several courts, including

1 at least one district court within the Ninth Circuit, have found that under this rule “[t]he court has  
 2 power to compel parties to agree as to all facts concerning which there can be no real issue.”  
 3 *Berger v. Brannan*, 172 F.2d 241, 243 (10th Cir. 1949); *see also Lisa Frank Inc. v. CSS Indus. Inc.*,  
 4 No. 12-CV-00180-TUC-FRZ, 2017 WL 4876466, at \*3 (D. Ariz. Mar. 29, 2017) (quoting  
 5 *Berger* with approval); *United States v. A T & T Co.*, 83 F.R.D. 323, 332 (D. D.C. 1979) (stating  
 6 that “Rule 16 contemplates that the Court may compel parties to stipulate as to all matters  
 7 concerning which there can be no real issue”).

8 Even if this Court does not wish to compel Plaintiff to accept Amtrak’s stipulation, it  
 9 cannot be doubted that Rule 16 empowers this Court to deem the facts as set forth in Amtrak’s  
 10 proposed stipulation as established for purposes of trial. As recently explained by the Delaware  
 11 Court of Chancery:

12 The *Holcombe* and *Berger* rulings have been criticized for speaking in terms of  
 13 “compel[ling] the parties to agree,” which employs the oxymoronic concept of an  
 14 involuntary stipulation. *See Colon v. Walgreens de San Patricio, Inc.*, 269 F.R.D.  
 15 165, 168–69 (D.P.R. 2010). **I believe both cases are better understood as**  
 16 **recognizing that a court has the power to hold that certain facts are admitted**  
 17 **or cannot be controverted in good faith. Such an approach “furthers the Rule**  
 18 **16 policy of limiting the trial to those issues that are actually in dispute without**  
 19 **impairing the basic rights of the litigants.”** Wright & Miller, *supra*, § 1527. The  
 20 current federal version of Rule 16 confirms this power by stating that during the  
 21 pretrial conference, the court may consider “obtaining admissions and stipulations  
 22 about facts and documents” so as to avoid unnecessary proof. Fed. R. Civ. P.  
 23 16(c)(2)(C); *see Wright & Miller*, *supra*, § 1525 (explaining that enumeration of  
 24 specific subjects in current federal rule confirmed pre-existing authority and was  
 25 designed to encourage courts to address those subjects).

26 *Itron, Inc. v. Consert Inc.*, 109 A.3d 583, 588, n. 3 (Del. Ch. 2015) (emphasis added).

27 Even if there were a question as to whether the Court could enter the stipulated facts under  
 28 Fed. R. Civ. P. 16 over Plaintiff’s objection, there can be no doubt that the rules of evidence also  
 29 give the Court the power to compel this result. As aptly explained by the United States District  
 30 Court for the District of Maryland:

Even if there is doubt about whether the court has the authority to directly order that a stipulation be involuntarily accepted pursuant to Fed.R.Civ.P. 16, **there can be no real dispute that the court has abundant authority to achieve this same result through Fed. R. Evid. 403, by evaluating whether the probative value of the evidence which is offered by the party resisting the proposed stipulation is outweighed by one of the undesirable consequences addressed by that rule.** If the court determines that “live evidence” is merely cumulative in light of the opposing party’s stipulation, it may simply rule that it will not be admitted.

*Briggs v. Dalkon Shield*, 174 F.R.D. 369, 373 (D. Md. 1997) (emphasis added).

For the reasons above, Amtrak respectfully submits that the Court accept its proposed stipulation rather than allow Plaintiff to call Train 501 crewmembers live. Such testimony carries enormous risk of unfair prejudice to Amtrak without any benefit to Plaintiff’s case that outweighs this risk. Moreover, it would be cumulative of testimony from Charles Kubilius (who carried Plaintiff from the scene) and Plaintiff herself. None of the facts proffered by Plaintiff during today’s hearing (e.g. train speed, trajectory, what car Plaintiff was riding, how far it fell, or her location in the milieu of the derailment) are in dispute; they are all covered in Amtrak’s stipulation.

If Plaintiff persists in resisting the stipulation, Rule 16, FRE 403, and the above authorities permit the Court to enter these facts as established and preclude the crew testimony. For example, the Court has the power to revise the Stipulated Facts section of the Pretrial Order, or give the Ninth Circuit Pattern Instruction No. 2.3 – Judicial Notice – which provides in pattern form: “The court has decided to accept as proved the fact that [state fact]. You must accept this fact as true.”

If the Court does allow any testimony from a Train 501 crewmember, Amtrak requests that the Court require Plaintiff to first make an offer of proof as to what the testimony will be so that Amtrak can preserve objections as to the unfairly prejudicial, irrelevant and cumulative nature of such testimony, as well as make any other appropriate objections based upon the actual offer of proof. Otherwise, there is a serious risk that the upcoming trial will be tainted by inadmissible and prejudicial evidence at the outset.

1 DATED: November 5, 2019  
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## **CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury of the laws of the State of Washington that on the date listed below, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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Executed this 5th day of November, 2019, at Seattle, Washington.

s/ *Alisa R. Flabel*  
Alisa R. Flabel, Legal Assistant